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Evidence--Judicial Notice (Shaw v. Tague, 257 N.Y. 193 (1931))

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contract,[1] especially when tainted with bribery.[2] Following the maxim of "whoever asks equity must do equity,"[3] it is required that the other party must be put in *status quo* [4] and the accrued benefits must be returned.[5] But where restitution is made impossible by the "duplicity of the wrongdoer" [6] the plaintiff is not deprived of his remedy.[7] However, the court, in shaping its decision may impose suitable terms.[8] The basic principle of equity is justice and equity will adapt its decree to the facts under consideration.[9] In the instant case, there was no question of the stock having passed to *bona fide* purchasers, since the exchanged stock had been transferred only to another corporation, whose officers were identical with those in the guilty corporation. The contract was voidable in its inception, and continued so, since there was no ratification.[10] In this instance, the court illustrated again that where it once secures jurisdiction of a case, it will apply its underlying equitable principles as liberally as necessary.

F. H.

EVIDENCE—JUDICIAL NOTICE.—Plaintiff was struck by an automobile, owned and operated by the defendant. At the trial, witnesses

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[1] Cohen v. Ellis, 42 Hun 660, 4 N. Y. St. Rep. 721 (N. Y. 1886); Delano v. Rice, 23 App. Div. 327, 48 N. Y. Supp. 295 (1st Dept. 1897); Chisholm v. Eisenbuth, 69 App. Div. 134, 74 N. Y. Supp. 496 (1st Dept. 1902); see also John v. Reynolds, 115 App. Div. 647, 10 N. Y. Supp. 293 (1st Dept. 1906) (exchange of stock in a telephone and telegraph company for shares in another telegraph company by false representation); Stern v. Stern, 122 App. Div. 821, 107 N. Y. Supp. 900 (1st Dept. 1907) (falsity concerning amount of production, dividends, etc.).

[2] Donemar, Inc. v. Malloy, 252 N. Y. 360, 169 N. E. 610 (1930).

[3] WALSH, EQUITY (1930) pp. 281 *et seq.*

[4] Gravenhorst v. Zimmerman, 236 N. Y. 22, 139 N. E. 766 (1923); Slater v. Slater, 240 N. Y. 557, 148 N. E. 703 (1925); Mincho v. Bankers Life Ins. Co. of City of New York, 124 App. Div. 578, 109 N. Y. Supp. 179 (1st Dept. 1908).

[5] McNamara v. Eastman Kodak Co., 232 N. Y. 18, 133 N. E. 113 (1921); Wolf v. National City Bank, 170 App. Div. 565, 156 N. Y. Supp. 575 (1st Dept. 1915); Sincerbeaux v. Queensboro Corp., 221 App. Div. 880, 224 N. Y. Supp. 915 (2d Dept. 1927).

[6] American Surety Co. v. Conner, 251 N. Y. 1, 10, 166 N. E. 783, 786 (1929).

[7] Thomas v. Beals, 154 Mass. 51, 27 N. E. 1004 (1891); Allerton v. Allerton, 50 N. Y. 670 (1872); Continental Insurance Co. v. Equitable Trust Co. of New York, 127 Misc. 45, 215 N. Y. Supp. 281 (Spec. T. 1926).

[8] Butler v. Prentiss, 158 N. Y. 49, 52 N. E. 652 (1899); Heckscher v. Edenborn, 203 N. Y. 210, 96 N. E. 441 (1911); Buffalo Builders Supply Co. v. Rieb, 247 N. Y. 170, 159 N. E. 899 (1928); United Zinc Companies v. Harwood, 216 Mass. 474, 103 N. E. 1037 (1914) (decided squarely on the Buffalo case).

[9] Philips v. West Rockaway Land Co., 226 N. Y. 507, 124 N. E. 87 (1919); Badger v. Scobell Chemical Co., 247 N. Y. 587, 161 N. E. 193 (1928).

[10] The very act of suing disaffirms any possibility of ratification.

were permitted to testify that, at the time of the accident, plaintiff's chestnut hair was just beginning to grey; and that within a day or two after the accident her hair had turned snow-white. No medical testimony was given to the effect that the accident was an adequate procuring cause of the change. The defendant made a motion to strike out this evidence. The motion was denied. Upon appeal, *held,* that it was not error to permit the jury to consider, on the question of damages, the fact that plaintiff's hair turned white, despite the absence of evidence tending to show that the change in color was directly due to the accident, and the shock occasioned thereby. *Shaw* v. *Tague,* 257 N. Y. 193, 177 N. E. 417 (1931).

Judicial notice has been characterized by one author as the most elastic doctrine in the realm of law.[1] It is patent that the list of things of which courts will take judicial cognizance is being constantly enlarged.[2] This principle which has been given formal definition by eminent courts [3] and text-writers [4] has been pithily summarized in a vigorous statement by the Supreme Court of California:[5]

> "Judicial notice is a judicial shortcut, a doing away, in the case of evidence, because there is no real necessity for it. So far as matters of common knowledge are concerned, it is saying there is no need of formally offering evidence of those things, because practically everyone knows them in advance, and there can be no question about them."

When the discretion of the court should be exercised, is to be determined by the following test:[6] (1) Is the fact one of common, everyday knowledge, which every one of average intelligence within the precincts of the court's jurisdiction can be presumed to know? and (2) Is the thing in question really a fact, certain and indisputable? These criteria require interpretation. Although it is true that "a fact must be pretty well known and pretty obvious besides, before

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[1] RICHARDSON, EVIDENCE (4th ed. 1931) §51.

[2] State v. Mission Pacific Ry. Co., 212 Mo. 658, 111 S. W. 500 (1908).

[3] U. S. v. Hammers, 241 Fed. 542 (S. D. Fla. 1917), quoting the U. S. Supreme Court: "Judicial notice or knowledge may be defined as the cognizance of certain facts which judge and jurors may, under the rules of legal procedure or otherwise, properly take and act upon without proof because they already know them."

People v. Goldberger, 163 N. Y. Supp. 663, 666 (1916). The Court of Special Sessions defined judicial notice as "a mode of ascertainment by judicial authority of matters of universal knowledge without having such matters established by evidence in the individual case."

[4] MCKELVEY, EVIDENCE (1924) §12. "The doctrine of judicial notice is that there are certain facts of which the courts will not require evidence, because they are so well known, so easily ascertainable or so related to the official character of the court, that it would not be good sense to do so."

[5] Varcoe v. Lee, 180 Calif. 338, 181 Pac. 223 (1919).

[6] *Ibid.*

it can be taken judicial notice of," [7] it is not requisite that *everyone* know it; [8] if by far the greater part of the intelligent community have such knowledge, it will suffice.[9] Truth alone will not support a taking of judicial notice; [10] general notoriety must exist.[11] So, the courts will not take notice of the cause of tumors on the human body,[12] nor of the fact that a blow might cause congestion of the lung,[13] but *will* take notice of the fact that vaccination prevents smallpox.[14] In general, caution is advised; and any doubt attendant upon the granting of judicial recognition should be promptly resolved in the negative.[15]

Applying these principles to the instant case, two queries must be propounded. Initial consideration must be given to the proposition of whether or not the great mass of people believe sudden fright may cause one's hair to turn white. The court decides this in the affirmative, and states its agreement simply with a reference to Byron's *"The Prisoner of Chillon."* [16] As to whether science authenticates the popular conception—here the court stands on more solid ground. A review of medical authorities is controlling.[17] The reviewer can

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[7] See International Harvester Co. v. Ind. Comm., 157 Wis. 167, 147 N. W. 53, 58 (1914).

[8] Matter of Viemeister v. White, 179 N. Y. 235, 72 N. E. 97 (1904).

[9] Topeka v. Stevenson, 79 Kan. 394, 99 Pac. 589 (1909); Moler v. Whisman, 243 Mo. 571, 147 S. W. 985 (1912).

[10] Baxter v. McDonnell, 155 N. Y. 83, 49 N. E. 667 (1898).

[11] Doyle v. City of New York, 58 App. Div. 588, 69 N. Y. Supp. 120 (2d Dept. 1901).

[12] Poumeroulie v. Postal Telegraph & Cable Co., 178 Mo. App. 357, 165 S. W. 1174 (1920).

[13] Koprivica v. Standard Acc. Ins. Co., 218 S. W. 689 (1920).

[14] Matter of Viemeister v. White, *supra* note 8.

[15] See Brown v. Piper, 91 U. S. 37, 42, 43 (1875).

[16] — "My hair is grey, but not with years;
Nor grew it white,
In a single night,
As men's have grown from sudden fears."

(In the annotated edition, reputed to have happened to Ludovico Sforza and Marie Antoinette.)

[17] The court quotes MULLER, HAIR AND ITS PRESERVATION: "Gray hair, so long regarded purely as a sign of approaching or premature age, is simply due to loss of pigment, or the presence of more or less air, within the hair, caused either by sickness, worry, shock, severe mental strain long continued, or accidents."

The supporting statement from that source is generally substantiated in the following:

STELWAGON, DISEASES OF THE SKIN (1923) 1031. "There are now to be found in medical literature a number of examples in which the change to grayness was noted to occur within the space of a few hours or days."

1 LAYCOCK, BRITISH AND FOREIGN MEDICAL-CHIRURGICAL REVIEW (1861) p. 458. Case recorded of a Sepoy whose hair turned gray in one-half hour.

2 RAYMOND, REVUE DE MEDECINE (1882) p. 770. Case of a woman's hair changing color in one night as a result of financial disaster.

but agree with this decision which proceeds along well-established legal principles.[18] Private dissent, if any, must be made on the grounds of disagreement with the opinion of the court that the fact in question is a notion commonly had.

H. H.

INSURANCE (LIFE)—PARTICIPATION IN "AERONAUTIC EXPEDITION."—Plaintiff's son in 1924 entered into a contract with the defendant for life insurance which provided for double indemnity in case of death by accident, unless it should be caused directly or indirectly by " * * * military or naval service of any kind in time of war or by engaging as a passenger or otherwise in submarine or aeronautic expeditions." While insured was traveling as a passenger from Albany to New York in an airplane operated by a large air transport company which maintained a regular passenger service, the machine fell and he sustained mortal injuries. Defendant appealed from a judgment granting double indemnity to the plaintiff, who was named beneficiary in the policy. *Held,* insured met his death while engaged in an "aeronautic expedition," hence within the exception of the policy and the plaintiff was not entitled to double indemnity. *Gibbs* v. *Equitable Life Assurance Society of United States,* 256 N. Y. 208, 176 N. E. 144 (1931).

It is a generally accepted principle that contracts of insurance will be given a construction which makes the contract fair and reasonable and that if any ambiguity exists, the interpretation will be in favor of the insured.[1] The advent of the newer modes of transportation in the air and under water and its recognized dangers has thrust upon the courts the duty of interpreting various clauses in insurance policies limiting liability where death or injury has resulted from such transportation. It has been held that a person riding in an airplane as a passenger on short trips has "participated in aeronau-

[18] Kieran v. Metropolitan Life Ins. Co., 13 Misc. Rep. 39, 34 N. Y. Supp. 95 (1895); Langdon v. Waldo, 158 App. Div. 936, 143 N. Y. Supp. 818 (2d Dept. 1913); Cavalier v. Chevrolet Motor Co. of N. Y., 189 App. Div. 412, 178 N. Y. Supp. 489 (3d Dept. 1919); Richardson v. Greenburg, 188 App. Div. 248, 176 N. Y. Supp. 651 (3d Dept. 1919); Wager v. White Star Candy Co., 217 App. Div. 316, 217 N. Y. Supp. 173 (3d Dept. 1926); Gilbert v. Klar, 223 App. Div. 200, 228 N. Y. Supp. 183 (4th Dept. 1928); Sloane v. So. Calif. Ry. Co., 111 Calif. 668, 44 Pac. 320, 322 (1896). "It is matter of general knowledge that an attack of sudden fright, or an exposure to imminent peril, has produced in individuals a complete change in their nervous system, and rendered one who was physically strong and vigorous, weak and timid." This statement, it will be seen, is a near approximation of the instant decision.

[1] Bushey & Son v. Amer. Ins. Co., 237 N. Y. 24, 142 N. E. 340 (1923).